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SUBJECT: VIETNAM: MEETING WITH JUSTICE MINISTRY ON ADOPTIONS

REFS: A) STATE 72446, B) Savage-Vann telcon May 7, 2002, C)

O-I May 19, 2003

1. (U) Summary. The GVN has indicated that the content of the draft MOU provided is generally quite good and close to their draft framework. However, the GVN is backtracking from earlier assurances by the former Vice Minister of Justice that Vietnam would be willing to go forward with an MOU as "the format and title" of the document were "not important." However, the GVN is now raising concerns regarding format and title of the document. Adoption, citizenship and children's rights are governed in Vietnam at the central (federal) level. The GVN is questioning an MOU's applicability beyond the ministry-to-ministry level (in Vietnam, the title MOU is given to ministry-to-ministry level documents) as well as the authority of ministry level employees (Embassy staff) to reach agreement and sign a document with broader applicability (GVN officials are rarely given such authority.) The GVN is interested in reaching a compromise, but would like to see a more formal title and format as well as written indications that the document will have broader applicability and that Embassy staff will have the authority to work towards consensus on such a document. Action request para 10. End summary.

2. (U) On May 7, 2003, Consular Chief met with Mr. Nguyen Van Binh, Vice Director of the Department for International Treaty and International Cooperation, Ministry of Justice (MOJ.)

3. (U) Binh stated that the overall content of the draft MOU submitted is "good," and quite close to their draft framework. He repeated this several times throughout the meeting. He added the disclaimer that he had not had time to review the document word-for-word, but he commented that there would be a lot of time to discuss on words and terms used in the MOU.

Questions of Applicability and Authority

4. (U) Binh said that the problems perceived at this early stage are with the title and the format of the MOU. The term "MOU" is used in Vietnam only for documents signed at the ministry-to-ministry level. Because of its larger legal implications, an adoption "agreement" must be signed at the government-to-government level, even if the negotiating and signing authority is delegated to the ministry level. He stated that recently, President Luong invited the Minister of Justice and the Minister of Foreign Affairs to a meeting to discuss international treaties and asked the two Ministries to standardize the titles of documents signed with foreign countries and ratified by the GVN.

5. (U) The GVN makes a clear distinction between the State and the Government. Binh explained that the GVN enters into international "treaties" at three levels: International treaties involving multiple governments are signed at the State-to-State level (i.e., by the President); bilateral treaties signed at Government-to-Government level (i.e., by the Prime Minister); and treaties signed at ministry-to-ministry level. The GVN wants adoption "agreements" to be signed at the 'bilateral' (Government-to-Government) level because adoption involves two legal fields (the rights of children and nationality law) which are the responsibility of the Prime Minister, not the Ministries. (Note: Given the tendency of GVN Ministries to ignore MOUs and commitments made by other Ministries, we are encouraged by MOJ's desire to arrive at an agreement that would ensure compliance by all the relevant GVN players. This has been a point of contention regarding the Agreed Consular Minute, which was signed by the State Department and the Foreign Ministry. The Ministry of Public Security's position is that it is not bound by the Minute, and this results in consular notification delays, impediments to prison visits, etc. Despite the greater effort the we will have to make on our part to satisfy the GVN's concerns, in the end we should have a document that is enforceable in Vietnam, which is the whole point.) End note.)

16. (U) Regarding negotiations, Binh said that the Vietnamese delegation taking part in formal discussions is an interagency delegation which includes representatives of Ministry of Justice, Ministry of Foreign Affairs, Ministry of Public Security, Ministry of Labor, Invalids and Social Affairs, the Office of the Government, and the Committee for Population and Family Planning. The discussions can be carried out in several rounds. Initially, specialists or experts can begin talks (round one) without a specific "delegation of authority" from the Prime Minister. For subsequent discussions (round two-three), a delegation of authority from the Prime Minister to the negotiating team is required in order to finalize the agreements and sign the documents. The Minister of Justice will similarly be delegated the authority to sign in the name of the President. France was not able to reach agreement in the first round - three rounds were ultimately needed. However, Italy and Denmark (who negotiated more recently), reached agreement in the first round and the formal delegation of authority was not required. (Comment: Although Binh did not mention it, obtaining such a "delegation of authority" can be time consuming. Even if not, it appears to raise the discussion to a more formal level that the U.S. would prefer to avoid. It is in our best interests to prepare to complete discussions in the first round. End comment.)

17. (U) Following the meeting, MOJ sent a dipnote reiterating the GVN's motivation for seeking a bi-lateral agreement and requesting a formal written explanation of the US position why such an agreement is not possible. While it may seem that the GVN is repeating previously covered material, we see this as a positive sign that the GVN is ready to move forward (although the direction of that progress is unknown). In Vietnam, no decision is made or recommendation made based on discussions alone. Until the issue or response is put into writing, it cannot be presented to higher authorities for decision. (We also note that they do not use the term MOU or agreement in their first paragraph.)

18. (U) Text of MOJ dipnote follows.

Begin Text.

The Ministry of Justice of the Socialist Republic of Vietnam presents its compliments to the Embassy of the United States of America in Hanoi and has the honor to mention preparation for the negotiations on adoption cooperation between the two countries.

The Ministry of Justice welcomes efforts made by the U.S. Embassy in advancing relations between the two countries regarding international adoptions. At the meeting between the Deputy Chief of Mission with ministerial level representative of MOJ and the Chief of the Consular Section with department level representative of MOJ, the Vietnam side provided information on Vietnamese law and practice regarding adoption. Currently, Vietnam is conducting negotiations with an aim to signing bilateral adoption agreements with foreign countries in order to provide the best protection of the rights of children adopted by foreigners. Under Vietnamese law, an international treaty regarding adoptions is of the kind that Vietnam signs in the name of the State - the highest level of international treaty with Vietnam. At the same time, according to agreement with other countries and Vietnamese convention, the name of this kind of international treaty is an "Agreement".

The Ministry of Justice highly values the content of "The Memorandum of Understanding Between the United States of America and the Socialist Republic of Vietnam Regarding Adoptions" prepared by the U.S. side. The content of the MOU is not much different from Vietnam's Framework that has been used as a foundation to negotiate with other countries. However, through the meetings, MOJ also understand the U.S. side's difficulties in selecting a name for the document regarding adoptions between the two countries. Therefore, the use of another name for the document (not MOU) this is in conformity with the desire of the two sides currently is still an open problem.

In order to have a foundation to report to the competent state agencies of Vietnam to consider and reach a decision on the issue of adoption negotiations between the two countries, the MOJ has the honor to request the Embassy to officially explain the U.S. legal stipulations relating to the U.S. authority for signing and formalities of U.S. international treaties; and at the same time, to confirm the difficulties on the U.S. side in selecting a name for the document regarding adoption between the two countries.

The MOJ appreciates the Embassy's efforts on this issue and hopes to receive the Embassy's response soon.

The Ministry of Justice of the Socialist Republic of Vietnam

avails itself of this opportunity to renew to the Embassy of the United State of American the assurances of its highest consideration.

End text.

Which Draft and Legal References

19. (U) Since the US draft and the GVN framework are so close in content, Binh stated that the question remains open as to which document to use as a basis for negotiation and stated that either is fine. (Post will indicate to Binh that we prefer to work from our draft.) Noting our reference to relevant US laws and the GVN circular and decree, he requested copies of the referenced US laws and indicated that there may be additional legal references on the GVN side (copies of any referenced laws will be provided).

U.S. Response

10. (U) Consular Chief reminded Binh of Vice Minister Cuong's earlier commitment to work towards an MOU instead of an agreement. (Comment: Former VM Cuong was a close and cooperative Embassy contact. However, Cuong is no longer at the Ministry of Justice and Binh may not feel compelled to fulfill commitments made by Cuong. End Comment.) Consular Chief reiterated US policy that no bilateral agreement is signed where a multilateral convention is available and reminded Binh of the time-consuming procedures required for obtaining Congressional ratification of a bilateral agreement. She explained that for the USG, bi-lateral treaties make law, from which policies are made; while an MOU is an equally significant document which goes straight to the policy making end-result. She also repeated the USG interest in moving forward quickly and corrected Binh's statement (para 3) that there is plenty of time for discussions.

Action Request

11. (U) The GVN request for written confirmation of negotiating authority is a common one as they rarely empower anyone below a Deputy Prime Minister level to make commitments on behalf of the GVN. In order to satisfy the GVN that the State Department has been delegated this authority by law or regulation and to address the concerns outlined in paras 5 and 6, please provide written confirmation/documentation that by U.S. law the State Department is assigned the role as central authority on international adoptions and the Ambassador/Embassy's authority to negotiate and sign on behalf of the USG. A second option would be to confirm that as the representative of the President, the Ambassador already has the authority to "negotiate" and sign an agreement at higher levels than ministry-to-ministry, and to document his delegation of that authority to our "team". Also, please provide a copy of: "United States Public Law 106-295, October 30, 2000 - The Child Citizenship Act of 2000" as per para 8.
BURGHARDT